

Planning and Development (Remission of Lease Variation Charges—Economic Stimulus and Sustainability) Determination 2016 (No 1)

Disallowable instrument DI2016–28

made under the

Planning and Development Act 2007, s278 (When commissioner must remit lease variation charges—sustainability) and s278E (When commissioner must remit lease variation charges—other)

EXPLANATORY STATEMENT

1. OBJECTIVES

The objective of this disallowable instrument (instrument) is to continue to generate building and construction industry activity and high level sustainability outcomes for the ACT. It does this by providing an economic stimulus to developers seeking to redevelop sites within the current economic climate.

It also encourages developers to continue to deliver higher sustainability outcomes by proposing development that will deliver above the industry norm. It does this by providing a further remission, or stimulus, for developments that propose high Green Star¹ energy ratings in the commercial sector and high NatHERS² ratings in the residential sector, and buildings that achieve compliance with the Australian Standard for adaptable housing (AS 4299-1995), Class C at 50 per cent or 100 per cent of the building.

2. BACKGROUND

A Lease Variation Charge (LVC) is payable when a lessee seeks to vary a lease and the lease variation is approved by a development approval granted under the *Planning and Development Act 2007* (Act). LVC is a charge on the added value, if any, that results from the variation and is calculated through a formula in the Act. The Act also provides that part of the charge or the whole of the charge may be remitted under prescribed circumstances. The instrument prescribes those circumstances and the amounts that must be remitted.

The previous instrument, DI 2014-48, provided an additional remission of 25 per cent for chargeable variations assessed under section 277 that included

¹ Green Star – is rating tool developed by the Green Building Council of Australia and can be accessed at www.gbca.org.au

² NatHERS – means a rating under the Nationwide House Energy Rating Scheme administered through the Ministerial Council on Energy and can be accessed at www.nathers.gov.au

development plans, bringing the total remission to 50 per cent. It also provided further remissions for sustainability and adaptable housing of between 10 and 25 per cent of the LVC payable.

DI 2014-48 expires on 6 March 2016, and this current instrument will extend the remissions for two years to 6 March 2018.

3. OVERVIEW

The ACT Government aims to continue to generate construction and investment activity at a time when demand is easing off and to encourage higher sustainability outcomes in those developments. The instrument applies to any development application (DA) approved on or after 7 March 2016 and where the DA also relates to development of a building on the land under the lease. This means that a DA may have already been lodged, but not approved, and if the DA meets the criteria or circumstances prescribed in the instrument then it may be eligible for a remission. For the purposes of this explanatory statement a DA that the instrument applies to is called an 'eligible DA'.

The instrument only applies to a section 277 chargeable variation as defined at section 276 *Definitions – div 9.6.3, s277 chargeable variations*. It cannot apply to a section 276E chargeable variation.

This instrument is made under two sections of the Act:

- section 278 *When the commissioner must remit lease variation charge – sustainability*; and
- section 278E *When the commissioner must remit lease variation charges – other of the Act*.

Section 278 provides that the Minister may determine requirements for energy efficiency for a building and that the Treasurer may determine an amount to be remitted and when the remission may be made.

Section 278E (1) provides that the Minister may determine circumstances, in addition to section 278 to section 278D, in which an amount of the charge for a section 277 chargeable variation must be remitted. The section provides that the Treasurer may determine an amount to be remitted for a variation that meets the determined circumstances.

Together section 278 and section 278E provides a platform to give effect to the objectives of the instrument. Section 278 provides a remission for sustainability while section 278E provides a remission as both an economic stimulus and to encourage adaptable housing.

A lessee who seeks to vary a lease, and the variation is a section 277 chargeable variation, will gain a economic stimulus remission of 25 per cent of the added value under section 278E. Further remissions, up-to the value of 25 per cent of the LVC, under section 278 and section 278E are available if an eligible DA meets stated requirements or circumstances, that is, the eligible DA nominates a high average

Green Star rating or NatHERS rating or meets the Australian Standard for adaptable housing.

In this way the lessee will have the option to only take-up the economic stimulus component, that is, 25 per cent of added value or to also access sustainability remissions up to a further 25 per cent of the LVC. The final amount of remission, that is, the total of all remissions under the instrument, is a one-off transaction against the LVC and is made at the time the LVC is determined and a notice of assessment under section 276D is given to the lessee. An approved lease variation cannot be actioned until the LVC is paid.

SPECIFIC PROVISIONS:

1 NAME OF INSTRUMENT

This section provides that the instrument is the *Planning and Development (Remission of Lease Variation Charges – Economic Stimulus and Sustainability) Determination 2016 (No 1)*. The name focuses on the economic stimulus and sustainability outcomes delivered through the instrument.

2 COMMENCEMENT

This section provides that the instrument commences on 7 March 2016, following on from the expiry of the previous instrument DI2014-48. This means that an eligible DA can access remissions provided in the instrument from 7 March 2016 to 6 March 2018 when the instrument ends.

In this way all eligible Das, that is, a DA for a section 277 chargeable variation that also includes design and siting for a building on the land in the lease, that is lodged but not approved will gain a minimum 25 per cent remission calculated on the added value, under the economic stimulus component of the instrument. The sustainability remissions may be accessed if the eligible DA also nominates average Green Star, NatHERS or adaptable housing compliance standards for the building.

The *Legislation Act 2001, Chapter 7 Presentation, amendment and disallowance of subordinate laws and disallowable instruments* applies.

3 APPLICATION

This section provides that the instrument only applies to a section 277 chargeable variation for a development application for a variation approved on or after the commencement of the instrument and the approval relates to a building on the land under the lease, that is, an *eligible DA*. This means that all eligible DAs will at a minimum be able to gain a 25 per cent economic stimulus remission calculated on the added value with a possible further 25 per cent sustainability remission calculated on the LVC.

The instrument does not apply to a DA lodged and approved before commencement of the instrument. In this case, the previous instrument DI2014-48 will apply.

4 DETERMINED CIRCUMSTANCES – ECONOMIC STIMULUS – ACT, S 278E (1)

This section provides that the Minister for Planning and Land Management determines that a development application for a section 277 chargeable variation of a nominal rent lease that is approved and that application relates to a building on the land under the lease is a circumstance for the purposes of section 278E(1).

A development application that meets this circumstance is eligible for a remission under section 5 (2) and may also be eligible for a further remission under another section of the instrument.

5 REMISSION OF LEASE VARIATION CHARGE—ECONOMIC STIMULUS—ACT, S 278E (2)

This section provides that the amount of remission determined by the Treasurer for a development application that meets the required circumstance at section 4 is 25 per cent of the added value and is calculated by a formula. Added value is the basis for calculating the LVC in the Act, section 277.

The remission amount is calculated through the formula:

$$(V_1 - V_2) \times 25\%.$$

The effect of the formula is to return 25 per cent of the added value through the remission DI and is in addition to the already retained 25 per cent of the added value delivered through the Act. This means that at a minimum an applicant will retain 50 per cent of the added value achieved through the lease variation.

This is the economic stimulus component of the instrument and works in conjunction with sections 7, 9 and 10 to provide a package of remissions that may apply to an eligible DA.

6 DETERMINED ENERGY EFFICIENCY REQUIREMENTS—ACT, S 278 (2)

This section provides that the Minister Planning and Land Management determines a Green Star rating of 5 or 6 or a NatHERS rating of 6.5 or 7 or 7.5 or higher as energy efficiency requirements for the purposes of section 278 of the Act.

The instrument requires developments to deliver high sustainability ratings. It uses two industry accepted tools: Green Star and NatHERS.

Green Star is a rating system developed by the Green Building Council of Australia. It is an industry recognised tool used in the commercial sector and can be accessed at www.gbca.org.au. There are two options for an eligible DA: either the development can deliver a Green Star average rating of 5 or it can deliver a Green Star average rating of 6. All of the building must deliver an average of the nominated rating meaning some parts may achieve a higher rating and some a lower but the average must be that nominated. A custom rating may be required to rate some developments.

NatHERS means the Nationwide House Energy Rating Scheme administered through the Ministerial Council of Energy. It is a tool used in the residential sector and can be accessed at www.nathers.gov.au. There are two options for an eligible DA: either the development can deliver an average NatHERS rating of 6.5 or 7 or it can deliver an average NatHERS rating of 7.5 or higher. All of the building must deliver an average of the nominated rating meaning some parts may achieve a higher rating and some a lower but the average must be that nominated.

An eligible DA must indicate in the application the average rating proposed for the building or buildings. A development may be made up entirely of one class of building: commercial or residential. Alternatively it may be made-up of mixed development, that is, part of the building is commercial and part of the building is residential. For a residential building all or part of the building may seek to meet the Australia Standard for adaptable housing.

A lessee is not obligated to seek a remission under section 7 of the instrument, meaning that there is no requirement to meet a higher level of energy efficiency other than which is already required to meet normal building standards.

7 ADDITIONAL REMISSION OF LEASE VARIATION CHARGE FOR CERTAIN ENERGY EFFICIENT DEVELOPMENTS—ACT, S 278 (3) (A)

This section provides that the Treasurer may determine the rates of remission of LVC for different developments for an eligible DA that nominates an average rating of Green Star 5 or Green Star 6 or NatHERS rating of 6.5 or 7 or a NatHERS rating of 7.5 or more. The remission points are 10 per cent and 25 per cent

Sustainability remissions are limited by section 10 of the instrument. The effect of section 10 is to limit the value of remissions available under this section and section 9 to 25 per cent of LVC. Section 5 (2) provides a remission of 25 per cent of the added value.

Sub-section (7) (1) provides that the section only applies to a section 277 chargeable variation. A chargeable variation is defined at section 276A of the Act.

Sub-section (7) (2) (a) provides that if an eligible DA nominates an average Green Star rating of 5 for the building the amount of LVC to be remitted is 10 per cent. This remission is additional to the remission made under section 5 (2) of the instrument. The two remission amounts, that is, under section 5 (2) economic stimulus and section 7 (2) (a) for energy efficiency are added together as are any further remissions made under section 9 (2) (a) or (b) for adaptable housing and sections 10 for a combination of compliance with energy efficiency and adaptable housing.

Sub-section (7) (2) (b) provides that if an eligible DA nominates an average Green Star rating of 6 for the building the amount of LVC to be remitted is 25 per cent. This remission is additional to the remission made under section 5 (2) of the instrument. The two remission amounts, that is, under section 5 (2) economic stimulus and section 7 (2) (b) for energy efficiency are added together as are any further remissions made under section 9 (2) (a) or (b) for adaptable housing and

section 10 for a combination of compliance with energy efficiency and adaptable housing.

Sub-section (7) (2) (c) provides that if an eligible DA nominates an average NatHERS rating of 6.5 or 7 for the building the amount of LVC to be remitted is 10 per cent. This remission is additional to the remission made under section 5 (2) of the instrument. The two remission amounts, that is, under section 5 (2) economic stimulus and section 7 (2) (c) for energy efficiency are added together as are any further remissions made under section 9 (2) (a) or (b) for adaptable housing and section 10 for a combination of compliance with energy efficiency and adaptable housing.

Sub-section (7) (2) (d) provides that if the relevant development application nominates an average NatHERS rating of 7.5 or more for the building the amount of LVC to be remitted is 25 per cent. This remission is additional to the remission made under section 5 (2) of the instrument. The two remission amounts, that is, under section 5 (2) economic stimulus and section 7 (2) (d) for energy efficiency are added together as are any further remissions made under section 9 (2) (a) or (b) for adaptable housing and section 10 for a combination of compliance with energy efficiency and adaptable housing.

8 DETERMINED CIRCUMSTANCES FOR ADAPTABLE HOUSING—ACT, s 278E (2)

This section provides that the Minister for Planning and Land Management determines that a eligible DA for a section 277 chargeable variation of a nominal rent lease that is approved and the building, or parts of the building complies with AS 4299-1995 Adaptable housing is a circumstance for the purposes of section 278E(2). A chargeable variation is defined at section 276A of the Act.

9 ADDITIONAL REMISSION OF LEASE VARIATION CHARGE FOR ADAPTABLE HOUSING—ACT, s 278E (2)

This section provides that the Treasurer may determine the rates of remission of LVC for different developments for an eligible DA that nominates that 50 per cent (but not 100 per cent) or 100 per cent of the building will meet the AS 4299-1955 Adaptable Housing. Like energy efficiency remissions there are two remission points: 10 per cent and 25 per cent.

Sustainability remissions are limited by section 10. The effect of section 10 is to limit the value of remissions available under this section and section 7 to 25 per cent of LVC. Section 5 (2) provides a remission of 25 per cent of the added value.

Sub-section (2) (a) provides that if an eligible DA nominates that 50 per cent but not 100 per cent of the building will comply with the AS than the amount of LVC to be remitted is 10 per cent. This remission is additional to the remission made under section 5 (2) of the instrument. The two remission amounts, that is, under section 5 (2) economic stimulus and section 9 (2) (a) for adaptable housing are added together, as are any further remissions made under section 7 (2) (a) or (b) or (c) or (d) for energy efficiency and section 10 for a combination of compliance with energy efficiency and adaptable housing.

Sub-section (2) (b) provides that if an eligible DA nominates that 100 per cent of the building will comply with AS 4299-1955 the amount of LVC to be remitted is 25 per cent. This remission is additional to the remission made under section 5 (2) of the instrument. The two remission amounts, that is, under section 5 (2) economic stimulus and section 9 (2) (b) for adaptable housing are added together, as are any further remissions made under section 7 (2) (a) or (b) or (c) or (d) for energy efficiency and section 10 for a combination of compliance with energy efficiency and adaptable housing.

10 REMISSION OF LEASE VARIATION CHARGE FOR COMBINATION OF COMPLIANCE WITH ENERGY EFFICIENCY OR ADAPTABLE HOUSING REQUIREMENTS—ACT, s 278 (3) (A) AND s 278E (2)

This section provides that if an eligible DA for a section 277 chargeable variation of a nominal rent lease nominates different compliance standards for different parts of the building that the amount of LVC that can be remitted is an amount equal to 25 per cent of the charge.

The examples provided demonstrate the effect of the section. Example one shows how an applicant may access sustainability remission of 20 per cent of the determined LVC. Example 2 shows that even though the value of remissions under section 7 (2) (d) and section 9 (2) (b) add up to 50 per cent, the amount of LVC to be remitted under section 10 (1) is 25 per cent of the determined LVC. This amount is additional to the amount remitted under section 5 (2).

The lessee is under no obligation to seek a remission under section 7 (2), 9 (2) or 10. They may decide that the development will meet one or both of the requirements for energy efficiency or adaptable housing, a combination of both or none. If they do seek a further remission, other than that available under section 5 (2) then they must nominate the level of energy efficiency and the level of adaptable housing, if any, that the development will achieve. This leaves the final mix of the development to the discretion of the lessee, who may decide to only take-up the economic stimulus component of the instrument. Alternatively the lessee may decide to seek a remission for energy efficiency or adaptable housing or both.

Sub-section 3 provides the meaning of *compliance standard* and *relevant provision* for the section.

11 WHEN AMOUNTS MUST BE REMITTED—ACT, s 278 (3) (B)

This section provides that the amount to be remitted under section 7 and 10 is remitted at the time the LVC is determined and the notice of assessment is provided to the lessee. The note provides that the amount to be remitted under section 5 and 9 may be remitted at the same time.

A notice of assessment (refer to section 276D of the Act) of the amount of LVC that is payable will state the LVC charge (refer to section 277 of the Act), the amount to be remitted under sections 278 and 278E (refer to the instrument section 5 (2),

section 7, 9 and 10) and the amount the lessee is required to pay before the variation can be executed (refer to section 276B of the Act).

12 DISAPPLICATION OF LEGISLATION ACT, s 47 (5)

The material mentioned in section 12 is incorporated into the disallowable instrument. The *Legislation Act 2001* section 47 (5) provides that an incorporated document is taken to be a notifiable instrument. A notifiable instrument must be notified on the legislation register under the Legislation Act.

However, the *Legislation Act* section 47 (5) may be displaced by the authorising law (the Act) or the incorporating instrument (this disallowable instrument) (see section 47 (7)). Section 47 (5) is displaced here because the incorporated material may be subject to copyright and is available over the Internet.

13 DEFINITIONS

This section provides definitions for *Green Star rating* and *NatHERS rating* for the instrument.

14 EXPIRY

This section provides that the instrument expires on 6 March 2018.

It is appropriate that the instrument expires at this time as the main objective of the instrument is to generate construction and investment activity for a further two years, and to continue to encourage higher sustainability outcomes in those developments.

Regulatory impact statement

The *Legislation Act 2001* section 36 states:

36. (1) A regulatory impact statement need not be prepared for a proposed subordinate law or disallowable instrument (the proposed law) if the proposed law only provides for, or to the extent it only provides for:
- (b) a matter that does not operate to the disadvantage of anyone (other than the Territory or a territory authority or instrumentality) by—
 - (i) adversely affecting the person's rights; or
 - (ii) imposing liabilities on the person;
 - (k) an amendment of a fee, charge or tax consistent with announced government policy.

In this case, a regulatory impact statement is not required. This is because the instrument:

- does not adversely affect any rights and does not impose liabilities. The instrument instead operates to a lessee's advantage by reducing the LVC in specified circumstances. The lessee determines whether or not they will take-up any component of the instrument and it operates in the same way for all lessees.
- gives effect to announced government policy.